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No. 99-

IN THE

# Supreme Court of the United States

JOHN DAVIS ORR,

*Petitioner,*

*v.*

INTERNAL REVENUE SERVICE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

RONALD A. SIMANK
*Counsel of Record*
LAURA M. BAKER
SCHAUER & SIMANK, P.C.
*Attorneys for Petitioner*
615 North Upper Broadway
Suite 2000
Corpus Christi, Texas 78477
(361) 884-2800

158616

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

7088

## QUESTION PRESENTED

Did federal tax liens filed by the Internal Revenue Service attach, prior to the time of filing of a taxpayer's Chapter 7 voluntary bankruptcy petition, to any "property" or "rights to property" with respect to a spendthrift trust beneficiary's right to receive unaccrued, undistributed future income payments from a spendthrift trust, or does a lien attach only to each net income payment when it accrues and is actually paid over to the beneficiary.

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Petitioner, John Davis Orr, ("Orr"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *In the Matter of: John Davis Orr, Debtor; Internal Revenue Service v. John Davis Orr*, 180 F.3d 656 (5th Cir. 1999) (App. A). The opinion of the district court is reported at *Internal Revenue Service v. John Davis Orr*, 239 B.R. 130 (S.D. Tex. 1998) (App. B). The Order Granting Summary Judgment of the bankruptcy court in *In re: John Davis Orr; John Davis Orr v. Internal Revenue Service*, Case No. 95-22895-C-7, Adversary No. 96-2021-C, is not published (App. C).

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on July 12, 1999. The Court of Appeals denied a timely Petition for Rehearing En Banc on January 10, 2000 (App E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount

(including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 26 U.S.C.A. § 6321 (West 1989).

11 U.S.C. § 541 provides in relevant part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: . . . (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date — (A) by bequest, devise, or inheritance . . . 11 U.S.C.A. § 541(a) (West 1993).

11 U.S.C. § 727 provides in relevant part:

(a) The court shall grant the debtor a discharge . . . (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . 11 U.S.C.A. § 727 (West 1993).

## STATEMENT OF THE CASE

The question in this case is whether federal tax liens filed by the Internal Revenue Service attached, prior to the time of filing of Mr. Orr's Chapter 7 voluntary bankruptcy petition, to any "property" or "rights to property" with respect to Mr. Orr's right to receive unaccrued, undistributed future income payments from a spendthrift trust, of which Mr. Orr is the beneficiary, or whether the liens attach only to each net income payment when it accrues and is actually paid over to Mr. Orr. The question arose in the context of an adversary proceeding initiated by Mr. Orr in the course of his bankruptcy proceeding. A recitation of the material factual and procedural background follows.

On April 24, 1965, Unis Chapman Eichelberger, Mr. Orr's grandmother, executed a document entitled "Unis Chapman Eichelberger Chapman Ranch Trusts." Mr. Orr is the named principal beneficiary of the Unis Chapman Eichelberger Chapman Ranch Trust I ("Trust"), which is the Trust at issue. Mr. Orr is co-trustee of the Trust, together with Mercantile Bank, N.A. Pertinent to the dispute between Mr. Orr and the IRS are the net income distribution[1] and spendthrift[2] provisions of the Trust document, which appear

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1. Paragraph 5(e) of the trust document reads in part:

> At all times when the principal beneficiary of a trust is living, over the age of thirty (30) years and competent, all of the net income of the trust shall be distributed to the principal beneficiary annually or at more frequent intervals.

2. The spendthrift provision appears at Paragraph 26 of the Trust document and reads as follows:

(Cont'd)

in the Joint Stipulation of Issues and Fact submitted by the parties to the bankruptcy court (App. D).

Mr. Orr did not file federal income tax returns for the years 1984 through 1991. After examination, Mr. Orr and the IRS reached an agreement whereby the IRS, on October 26, 1992, assessed taxes, penalties and interest for 1984 through 1991. Notices of Federal Tax Liens were filed on January 11, 1993 in the personal and real property records of Nueces County, Texas for those tax years.

On November 1, 1995, Mr. Orr filed for relief under Chapter 7 of the Bankruptcy Code. There is no dispute that on the petition date, Mr. Orr was of the required age under the terms of the Trust to receive net income distributions, if any were available to be made. The bankruptcy court granted Mr. Orr his discharge pursuant to 11 U.S.C. § 727 on May 21, 1996.

Mr. Orr initiated an adversary proceeding on February 8, 1996, seeking to determine whether he had been personally discharged from federal income tax liability for the years 1984 through 1992, and to avoid the liens, if any, of the IRS

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(Cont'd)

> No trust assets or income shall be liable for the debts of any beneficiary, nor subject to seizure under any judicial writ or proceeding. No beneficiary shall have the power to give, grant, sell, assign, transfer, mortgage, pledge, encumber, or in any manner to anticipate or dispose of the interest in the trust estate or its income or to dispose of any trust property until it has been actually delivered to him in accordance with the terms hereof, except that the foregoing shall in no manner restrict the authority otherwise granted to any trustee who is a beneficiary to distribute the trust property as provided herein.

on post-petition net income distributions received by him as beneficiary of the Trust. In the bankruptcy court, the parties stipulated to all relevant facts, including Mr. Orr's personal discharge for tax liability for the years 1984 through 1991.

The matter proceeded on cross-motions for summary judgment. Following oral argument, the bankruptcy court granted Mr. Orr's motion and denied the motion of the IRS, ruling that the IRS liens attached only to net income distributions made to Mr. Orr through April 30, 1996, but not to subsequent net income distributions.[3]

On appeal by the IRS, the district court reversed the decision of the bankruptcy court. The district court held that the IRS liens attached prepetition to Mr. Orr's right to receive net income distributions in the future, thereby permitting the IRS to satisfy the tax liability from these future net income distributions until paid in full.

Mr. Orr appealed the district court's decision, Following oral argument, the Court of Appeals issued its opinion on July 12, 1999, affirming the decision of the district court. Mr. Orr's Petition for Rehearing En Banc was denied on January 10, 2000.

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3. In imposing this time limitation, the bankruptcy court relied on 11 U.S.C. § 541(a)(5)(A), which operates to bring into the bankruptcy estate property acquired by bequest, devise or inheritance during the 180-day period following the filing of the bankruptcy petition.

## REASONS FOR GRANTING THE WRIT

### THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND BECAUSE THE ANALYSIS EMPLOYED BY THE COURT BELOW CONFLICTS WITH PRIOR RELEVANT DECISIONS OF THIS COURT.

Section 6321 of the Internal Revenue Code provides for the imposition of a lien, for the purpose of collecting delinquent taxes, on the "property" or "rights to property" belonging to a taxpayer. 26 U.S.C. § 6321 (West 1989). This Court has previously noted that the language of § 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States v. National Bank of Commerce*, 472 U.S. 713, 719-20, 105 S. Ct. 2919, 86 L. Ed. 2d 565 (1985); *see also Glass City Bank v. United States*, 326 U.S. 265, 267, 66 S. Ct. 108, 90 L. Ed. 56 (1945) (observing that "stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes").

It is well-settled in the decisions of this Court that in determining whether a federal tax lien attaches to a particular interest held by a taxpayer, the identification of that interest is left to state law, while the consequences that attach to that interest is a matter governed by federal law. *United States v. Rodgers*, 461 U.S. 677, 683, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983); *Aquilano v. United States*, 363 U.S. 509, 512-13, 80 S. Ct. 1277, 4 L. Ed. 2d 1365 (1960). In a recent decision, this Court has clarified this principle, stating that

its proper application involves an initial examination of state law to determine what rights the taxpayer has in the property the Government seeks to reach. *Drye v. United States*, 120 S. Ct. 474, 481, 145 L. Ed. 2d 466 (1999). Federal law is then consulted to determine whether the taxpayer's state-delineated rights qualify as "property" or "rights to property" pursuant to the Internal Revenue Code provision imposing the tax lien. *Id.*

In its previous application of this principle to various taxpayer interests, this Court held that a taxpayer's right under state law to withdraw all of the proceeds deposited in a joint bank account amounted to "property" or "rights to property subject to a lien for federal taxes, although state law would not allow ordinary creditors of the taxpayer to reach those funds. *United States v. National Bank of Commerce*, 472 U.S. 713, 723-27, 105 S. Ct. 2919, 86 L. Ed. 2d 565 (1985). Similarly, a taxpayer's right to compel an insurer to pay over to her the cash surrender value of a life insurance policy was found to qualify that cash surrender value as "property" or "rights to property" subject to a federal tax lien. *United States v. Bess*, 357 U.S. 51, 56-57, 78 S. Ct. 1054, 2 L. Ed. 2d 1135 (1958). This was so although state law prohibited the attachment of creditor liens to the cash surrender value of a policy. *Id.* In *Bess*, however, this Court also concluded that the insurance policy proceeds themselves were not "property" to which a lien could attach because the insured could not enjoy the proceeds in her lifetime. 357 U.S. at 55-56.

Having noted these previous decisions, the Court in *Drye* found that the United States Court of Appeals for the Eighth Circuit had correctly applied the law to determine whether a taxpayer's interest as the heir to his mother's estate was

subject to a federal tax lien, although the taxpayer had exercised his right under Arkansas state law to disclaim his inheritance. *Drye*, 120 S. Ct. at 482. Specifically, the Eighth Circuit had first examined what rights state law accorded to the taxpayer in his mother's estate, finding that under Arkansas law, the taxpayer had, at his mother's death, a valuable, transferable, legally protected right to an interest in her estate. *Id.* Furthermore, as a prospective heir, the taxpayer would be permitted to assign his expectancy in the estate, which assignment would be enforceable when the expectancy ripened into a present estate. *Id.*

In noting with approval the analysis applied by the Eighth Circuit, this Court, at note 7 of the *Drye* decision, made the following observation: -

> In recognizing that state-law rights that have pecuniary value and are transferable fall within § 6321, we do not mean to suggest that transferability is essential to the existence of "property" or "rights to property" under that section. For example, although we do not here decide the matter, we note that an interest in a spendthrift trust has been held to constitute "property" for purposes of § 6321, even though the beneficiary may not transfer that interest to third parties. *See Bank One [Ohio Trust Co. v. United States]*, 80 F.3d at 176 [6th Cir. 1996]. Nor do we mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate.

*Drye*, 120 S. Ct. at 482-83 n.7.

The taxpayer proceeded to argue before this Court that his right under Arkansas law to disclaim the inheritance was personal to him and not marketable. This Court rejected that argument, reasoning that the primary right accorded by Arkansas law to the taxpayer — the right to claim the inheritance or to channel it to a close family member–was a right of considerable value in that the taxpayer exercised dominion over the property by determining who would receive it. *Drye*, 120 S. Ct. at 483. This ability to exercise dominion over estate assets lead this Court to conclude that the taxpayer held "property" or "rights to property" that were subject to the Government's tax liens. *Id.*

Thus, the *Drye* decision has established that in examining the rights that state law accords to a taxpayer with respect to a particular interest, the federal courts should identify the primary right accorded and should then determine whether that primary right has value because of the dominion the taxpayer is able to exercise. The Court continues to find that the characteristics of pecuniary value and transferability are relevant to a determination of "property" or "rights to property," but should be examined in conjunction with the element of control.

In its opinion below, the United States Court of Appeals for the Fifth Circuit concluded that Mr. Orr's equitable ownership interest in the Trust corpus and right to receive distributions from the trust were sufficient in themselves to constitute "property" or "rights to property," and that the Government's need to collect taxes rises above the wishes of the creator of a spendthrift trust. The Fifth Circuit, however, failed to examine the rights actually accorded under Texas state law to Mr. Orr as the beneficiary of a spendthrift trust, although this Court's decisions in *National Bank of Commerce*, *Bess*, and now *Drye* mandate such an analysis.

Mr. Orr's primary right as the beneficiary of the Trust is to receive the net income, if any, that is generated by the Trust corpus. It has been Mr. Orr's position throughout these proceedings that this right lacks transferability and calculable pecuniary value, and the net income is beyond his dominion and control until it is actually paid over to him.

With respect to the transferability of his interest, Mr. Orr cannot alienate, assign or pledge his expectancy in receiving the net income. *See Becknal v. Atwood*, 518 S.W.2d 593, 598 (Tex. Civ. App. — Amarillo 1975, no writ) (spendthrift trust beneficiary may not anticipate or assign his interest in, or income from, trust estate); *Long v. Long*, 252 S.W.2d 235, 246 (Tex. Civ. App. — Texarkana 1952, writ ref'd n.r.e.) (spendthrift trusts are exception to general rule that alienability of estate is incident of ownership).

With respect to the pecuniary value of his interest, there is as a practical matter no determinable present value to the stream of net income payments that Mr. Orr might receive in the future. "Income" is defined in Texas as the return derived from the use of principal and includes receipts from business and farming operations, such as that comprising the Trust corpus in the present case, calculated in accordance with generally accepted accounting principles. TEX. PROP. CODE ANN. §§ 113.102(a)(5), 113.106 (Vernon 1995). The calculation is not subject to interpretation by trustees or trust beneficiaries, but is an objective calculation determined by subtracting expenditures properly chargeable to income from receipts properly allocable to income. *See* 5-HERBERT S. KENDRICK & JOHN J. KENDRICK, JR., TEXAS TRANSACTION GUIDE: ESTATE PLANNING § 50B.30 (1992 ed.) (citing III SCOTT, *THE LAW OF TRUSTS*, § 233 (3d ed. 1967) (discussing calculation of net income).

Thus, net income is not determinable and has no recognizable value until the properly chargeable expenses for a fiscal period are deducted from the receipts from farming operations for that fiscal period. It is at this point that net income becomes payable to Mr. Orr, who can then exercise dominion and control over the use to which it is put. Because the farming operations that comprise the Trust corpus are entirely dependent on the vagaries of the South Texas climate, there is no assurance that the corpus will yield any net income in a given fiscal period, let alone be susceptible to long-term projections for purposes of valuation.

The present case thus possesses a unique combination of the factual circumstances specifically referenced by the *Drye* Court at footnote 7 of its opinion, and which have not yet been brought squarely before this Court. On the one hand, the interest at issue is the nontransferable interest of a spendthrift trust beneficiary. On the other hand, the net income payments in the present case do not ripen into a present estate until they are calculated for each fiscal period and paid over to Mr. Orr. Mr. Orr's petition should be granted so that the Court can settle the important question of whether a spendthrift trust beneficiary's right to receive unaccrued, undistributed future net income payments constitutes "property" or "rights to property" such that a federal tax lien may attach, or whether the tax lien attaches only when each net income payment accrues and is actually paid over to the beneficiary.

## CONCLUSION

The important question presented by this case is whether a spendthrift trust beneficiary's right to receive unaccrued, undistributed future net income payments from a spendthrift trust constitutes "property" or "rights to property" such that a federal tax lien may attach, or whether the tax lien attaches only when each net income payment accrues and is actually paid over to the beneficiary. The opinion below creates significant yet flawed judicial precedent concerning the attachment of federal tax liens. By granting Mr. Orr's petition, this Court can correct the Fifth Circuit's decision, which employed an erroneous analysis of the rights accorded to Mr. Orr under Texas state law as the beneficiary of a spendthrift trust. The appropriate analysis has been established in this Court's previous decisions, and most expressly in the decision in *Drye v. United States*, 120 S. Ct. 474, 145 L. Ed. 2d 466 (1999). In addition, this case presents an opportunity for the Court to address an issue of apparent interest to it, which has yet to be squarely presented for consideration.

For the foregoing reasons, John Davis Orr respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

RONALD A. SIMANK
*Counsel of Record*
LAURA M. BAKER
SCHAUER & SIMANK, P.C.
*Attorneys for Petitioner*
615 North Upper Broadway
Suite 2000
Corpus Christi, Texas 78477
(361) 884-2800

# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 12, 1999**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 98-40170**

**In The Matter Of: JOHN DAVIS ORR,**

**Debtor.**

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**INTERNAL REVENUE SERVICE,**

**Appellee,**

**VERSUS**

**JOHN DAVIS ORR,**

**Appellant.**

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

DeMOSS, Circuit Judge:

A spendthrift trust beneficiary who extinguished personal federal tax liabilities through bankruptcy now appeals the determination by the district court that distributions from the trust are subject to a prebankruptcy

federal tax lien until the tax liability is satisfied. The district court's order conclusively settles a discrete issue within the bankruptcy case, and is appealable pursuant to 28 U.S.C. § 158(d). We conclude that the federal tax lien on Orr's income distributions from this Texas spendthrift trust attached to future distributions at the time of the creation of the lien, and not as of the time each distribution was made. The lien thus predates and survives the bankruptcy. The judgment below is, therefore, affirmed.

## I.

On April 24, 1965, Unis Chapman Eichelberger executed a document entitled "Unis Chapman Eichelberger Chapman Ranch Trusts" ("Trust Document"). Eichelberger's grandson, John Davis Orr, is the named principal beneficiary of the Unis Chapman Eichelberger Chapman Ranch Trust I ("Trust"), described in the Trust Document. The Trust provides that Orr, after reaching the age of thirty, shall receive "all of the net income of the trust . . . distributed . . . annually or at more frequent intervals." The Trust lasts for Orr's life and then terminates. Orr has limited testamentary power over the distribution of the Trust's property after his death, but if Orr does not exercise this power the property is distributed to Orr's then-living descendants, and if no such persons exist, to charity. The spendthrift provision reads as follows:

> No trust assets or income shall be liable for the debts of any beneficiary, nor subject to seizure under any judicial writ or proceeding. No beneficiary shall have the power to give, grant,

> sell, assign, transfer, mortgage, pledge, encumber, or in any manner to anticipate or dispose of the interest in the trust estate or its income or to dispose of the interest in the trust estate or its income [sic] or to dispose of any trust property until it has been actually delivered to him in accordance with the terms hereof, except that the foregoing shall in no manner restrict the authority otherwise granted to any trustee who is a beneficiary to distribute the trust property as provided herein.

Despite the generous provisions made for him by his grandmother, Orr has encountered financial difficulties. He filed for bankruptcy relief under Chapter 7 on November 1, 1995, and received his discharge on May 21, 1996. He has received no distributions from the Trust since filing for bankruptcy relief. And, most pertinent to the present controversy, he had previously run afoul of the Internal Revenue Service by failing to pay income taxes.

Orr failed to file his federal income tax returns for 1984 through 1991. After examination, the IRS and Orr agreed to the amount of tax and signed a Form 4549-CG, Income Tax Examination Changes, consenting to assessment and collection on October 1, 1992. On October 26, 1992, the IRS assessed the taxes, penalties, and interest reflecting the consent. Despite notice and demand, Orr's federal income tax liabilities for the taxes assessed on October 26, 1992 (to the date of the bankruptcy petition) were as follows:

*Appendix A*

| Year | Amount |
|---|---|
| 1984 | $160,062.08 |
| 1985 | 63,126.91 |
| 1986 | 88,018.08 |
| 1987 | 79,723.98 |
| 1988 | 141,729.83 |
| 1989 | 29,435.00 |
| 1990 | 45,436.27 |
| 1991 | 23,842.35 |

Notices of federal tax liens were filed in the personal and real property records of Nueces County, Texas for the 1984 through 1991 income tax liabilities on January 11, 1993. Orr also owed federal income taxes on the date of petition for 1992 in the amount of $2.69. Notices of federal tax liens were filed in the personal and real property records of Nueces County for the 1992 income tax liability on December 28, 1993. At the times the notices of federal tax liens were filed, Orr was a resident of Nueces County.

Orr filed this adversary action to determine the answer to one stipulated issue: "Whether the Internal Revenue Service's Notices of Federal Tax Lien attached to any interest of Debtor in the Unis Chapman Eichelberger Chapman Ranch Trust I to secure the payment of Debtor's federal income tax liabilities for 1984 through 1992?" The parties agree that Orr can be granted a personal discharge from his federal tax liability for 1984 through 1991 pursuant to 11 U.S.C. § 727, but not for his liability for 1992. Furthermore, the parties stipulated that the federal tax liens attached to Orr's property or interests in property in existence at the time of his

bankruptcy filing are not dischargeable as to the property to which they attached. There is no stipulation as to whether the federal tax liens attached or attaches to any of Orr's interest in the Trust or its assets, or that Orr has or had an interest in the Trust or its assets.

Orr prevailed in the bankruptcy court. The IRS appealed to the district court, which reversed the bankruptcy court. Orr now appeals the judgment of the district court.

## II.

Counsel were instructed to brief the question of "[w]hether the order from which appeal is taken in the bankruptcy case is a final order for purposes of appeal." The parties agree that this Court may properly exercise its appellate jurisdiction, invoking the grant of jurisdiction in 28 U.S.C. § 158(d). That statute provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d). Subsection (a) provides for the appellate jurisdiction of district courts over inter alia, "final judgments, orders, and decrees . . . of bankruptcy judges." (Subsection (b), which is inapplicable in this case, pertains to the jurisdiction of bankruptcy appellate panels.)

Orr prevailed on his motion for summary judgment in the bankruptcy court, based on his contention that the tax liens do not attach to his post-discharge income distributions from the Trust. In the context of a bankruptcy proceeding, this grant of summary judgment qualified as a "final order" reviewable by the district court. This Court has explained:

> A [bankruptcy] case need not be appealed as a "single judicial unit" at the end of the entire bankruptcy proceeding, but the order must constitute a " 'final determination of the rights of the parties to secure the relief they seek in this suit,' " or the order must dispose of a discrete dispute within the larger bankruptcy case for the order to be considered final.

***Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)***, 844 F.2d 1142, 1155 (5th Cir. 1988) (internal citations omitted). There is, therefore, a lower threshold for meeting the "final judgments, orders, and decrees" appealability standard under 28 U.S.C. § 158(a) than there is for the textually similar "final decisions" appealability standard under 28 U.S.C. § 1291. In this case, the decision of the bankruptcy court resolved all dispositive issues pertaining to the discrete dispute concerning the post-discharge viability of pre-discharge federal tax liens on Orr's interest in the Trust, and therefore was ripe for appeal to the district court.

Likewise, the district court's reversal of the bankruptcy court is reviewable by the court of appeals pursuant to 28 U.S.C. § 158(d). Review of "final decisions, judgments, orders, and decrees" under § 158(d) is more akin to review of "final decisions" under § 1291 in nonbankruptcy appeals, whereby "[a] decision is final when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " ***Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.***, 170 F.3d 536, 539 (5th Cir. 1999) (quoting ***Askanase v. Livingwell, Inc.***, 981 F.2d 807, 810

(5th Cir. 1993) (quoting ***Coopers & Lybrand v. Livesay***, 437 U.S. 463, 467, 98 S. Ct. 2454 (1978))). But even under § 158(d), "this court's determination of whether an order is final (and therefore appealable) is more liberal in the bankruptcy context" than under § 1291. ***See Lentino v. Cage (In re Lentino)***, No. 98-20626, 1999 WL 77140, at *2 (5th Cir. Mar. 5, 1999) (summary calendar).

If this adversary proceeding stood alone as an independent case, it would be appealable even under the higher standard of § 1291. Now that the district court has overruled the bankruptcy court and ordered "that IRS' lien shall attach to all income distributions made to Orr from the spendthrift trust at issue," there is nothing left for the bankruptcy court to do. Hence, the matter is sufficiently "final" for appellate review.

## III.

Orr is the beneficiary of a spendthrift trust. Texas law has historically respected the validity of spendthrift trusts. *See, e.g.*, ***Caples v. Buell***, 243 S.W. 1066 (Tex. Comm'n App. 1922); *see generally* 72 Tex. Jur. 3d *Trusts* §§ 37-42 (1990). The state specifically acknowledges the validity of spendthrift trusts by statute. *See* Tex. Prop. Code Ann. § 112.035 (Vernon 1995).

The creation of a trust involves the separation of legal and equitable ownership of property. The trustee is the legal owner of the corpus of a spendthrift trust; the beneficiary is the equitable owner. *See, e.g.*, ***Burns v. Miller, Hiersche, Martens & Hayward, P.C.***, 948 S.W.2d 317, 322 (Tex. App. — Dallas 1997, writ denied).

*Appendix A*

The tax liens at issue in this case were created pursuant to 26 U.S.C. § 6321, which provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321. "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." ***Glass City Bank v. United States***, 326 U.S. 265, 267, 66 S. Ct. 108, 110 (1945). "Congress meant to reach every interest in property that a taxpayer might have." ***United States v. National Bank of Commerce***, 472 U.S. 713, 719, 105 S. Ct. 2919, 2924 (1985). The Supreme Court has construed the language of § 6321 to mean that a tax lien attaches not only to property owned by the debtor at the time the lien attaches, but also to after-acquired property until the tax liability is satisfied. *See* ***Glass City Bank***, 326 U.S. at 267-69, 66 S. Ct. at 110-11.

The interaction between federal and state law in this area is an important facet of our analysis. It is well-settled that in federal taxation cases, the definition of underlying property interests is left to state law, but the consequences that attach to those interests are determined by reference to federal law. *See* ***United States v. Rodgers***, 461 U.S. 677, 683, 103 S. Ct. 2132, 2137 (1983); ***Aquilino v. United States***, 363 U.S. 509,

513, 80 S. Ct. 1277, 1280 (1960). Thus, we look to state law to determine the character of any property right Orr may have in future distributions from the Trust, but federal law determines whether or not, and at what point in time, a tax lien may attach to that property interest. *See, e.g.*, ***United States v. Bess***, 357 U.S. 51, 55-57, 78 S. Ct. 1054, 1057-58 (1958).

**A.**

The principle of the ***Glass City Bank*** case (that a tax lien attaches to the debtor's after-acquired property until the tax liability is satisfied) was long ago extended to include the attachment of a tax lien to after-acquired distributions from a spendthrift trust. *See* ***United States v. Dallas Nat'l Bank***, 152 F.2d 582 (5th Cir. 1945) (hereinafter, ***Dallas I***), *appeal after remand*, 164 F.2d 489 (5th Cir. 1947), *appeal after second remand*, 167 F.2d 468 (5th Cir. 1948) (hereinafter, ***Dallas III***). The precise holding of the ***Dallas*** opinions is the main bone of contention in the appeal of Orr's case, which involves the added feature of an intervening bankruptcy. Orr's filing for bankruptcy relief under Chapter 7 did not affect the validity of any tax lien the IRS may have had prior to the filing. Ordinarily, liens and other secured interests survive bankruptcy. *See* ***Farrey v. Sanderfoot***, 500 U.S. 291, 297, 111 S. Ct. 1825, 1829 (1991); *see also* 11 U.S.C. § 522(c)(2)(B) ("Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except . . . a tax lien, notice of which is properly filed[.]"); ***Isom v. United States (In re Isom)***, 901 F.2d 744, 745 (9th Cir. 1990) ("The liability for

the amount assessed remains legally enforceable even where the underlying tax debt is discharged in the bankruptcy proceeding. A discharge in bankruptcy prevents the I.R.S. from taking any action to collect the debt as a personal liability of the debtor. . . . [T]heir property remains liable for a debt secured by a valid lien, including a tax lien."). There is no discussion in 11 U.S.C. § 541(c)(2) of liens, tax or otherwise, that attach before bankruptcy discharge. Repeatedly, courts have been willing to attach liens to post-discharge benefits despite the "fresh start" policy of the bankruptcy scheme. *See, e.g.*, ***Connor v. United States (In re Connor)***, 27 F.3d 365 (9th Cir. 1994); ***In re Wesche***, 193 B.R. 76 (Bankr. M.D. Fla. 1996). The IRS therefore has a valid tax lien against Orr's interest in the Trust if that lien attached before Orr's personal liabilities were extinguished in bankruptcy. The dispositive issue is, therefore, the question of whether a federal tax lien in this situation attaches to a spendthrift trust beneficiary's equitable interest in the trust itself or to each individual distribution as it is paid to the beneficiary. Both parties to this appeal claim support for their respective positions in ***Dallas***.

***Dallas*** involved a federal tax liability owed by Carolyn Maxwell, arising from several stock transactions. Mrs. Maxwell was a resident of England, so the government sought to enforce the tax liability by imposing a lien on her interest in a spendthrift trust, of which the Dallas National Bank was trustee. As in the customary trust arrangement, the trustee possessed legal title to the trust funds. Mrs. Maxwell received monthly income payments from the trust. This Court concluded that the government had a valid lien, and explained the result as follows:

> Mrs. Maxwell has no title to the corpus of any property other than the profits after they have accrued and have been passed to her account and made available to her by the Trustee. In other words, after "the net revenues," amounting to approximately $54 per month, accrue, or are set apart and become payable to her, such net revenues then belong to her and are then subject to the lien of the Government for taxes, and are available as an appropriate res in a proceeding in rem by the Government to have a lien for delinquent taxes declared and enforced against such revenues.
>
> The Government is entitled to a lien upon these monthly payments of net revenue in the hands of the Trustee, by virtue of the law as stated in 26 U.S.C.A.Int.Rev.Code, §§ 3670 and 3671.
>
> Under the holding of [***Glass City Bank***], that the lien of the United States attaches to after-acquired property, we think that such lien will continue to be fastened on the monthly income from the trust as it becomes payable to the taxpayer.

***Dallas I***, 152 F.2d at 585 (footnote omitted). In a following appeal (***Dallas III***), Circuit Judge Edwin R. Holmes of Yazoo City, Mississippi, noted in a specially concurring opinion that:

> The taxpayer is the equitable owner for life of an undivided interest in Texas realty, which under local law is not subject to seizure or sale for ordinary debts incurred by the taxpayer; but this does not mean that testamentary restraints against alienation should prevail against the fastening of a lien for federal income taxes on the taxpayer's equitable interest in the trust estate. We are, in fact, holding the contrary in this case.

***Dallas III***, 167 F.2d at 469 (Holmes, J., specially concurring). Orr emphasizes the language in ***Dallas I*** that "such lien will continue to be fastened on the monthly income from the trust *as it becomes payable to the taxpayer*," 152 F.2d at 585 (emphasis supplied), in support of his contention that no valid lien would exist until he actually received a distribution from the trust, and because through bankruptcy he has discharged his personal liability for the tax, the lien can no longer continue to attach to future distributions. *See, e.g.*, ***Connor***, 27 F.3d at __. The IRS emphasizes the language in ***Dallas III*** indicating that the lien attaches to Orr's "*equitable interest* in the trust estate," 167 F.2d at 469 (emphasis supplied), and therefore precedes and survives Orr's bankruptcy.

The ***Dallas*** panels did not need to confront the question presented by Orr's case. The trust distributions paid to Mrs. Maxwell fell into the category of after-acquired property at the time she received them. There was no bankruptcy, as there is in this case, to discharge the debtor's personal liability for the taxes owed. As Mrs. Maxwell received each new distribution from the trust, a new § 6321 lien would

fasten onto the distribution so long as she owed the taxes. The law was settled in ***Glass City Bank*** that such after-acquired property became subject to a statutory federal tax lien on the debtor's "property," and thus there was no need to decide whether the lien could have attached earlier. The ***Dallas I*** opinion specifically invokes ***Glass City Bank*** to justify its result. Thus, the opinion of Judge Holmes (which was not joined by any other judge) that the tax lien validly attached to Mrs. Maxwell's equitable interest in the trust was not necessary to the decision in that case.

**B.**

The issue addressed by Judge Holmes, specially concurring in the ***Dallas III*** appeal, is squarely presented by Orr's case, because the only way the IRS can collect from Orr's trust distributions is if the tax lien on future distributions attached before Orr's personal liability was discharged through bankruptcy. With the issue now squarely presented, fifty-one years later, we conclude that the dictum announced by Judge Holmes was correct. Texas law recognizes the validity of the Trust's spendthrift clause. Texas law acknowledges that a spendthrift trust beneficiary possesses an equitable ownership interest in the trust corpus. And Texas law respects the Trust's bestowal upon Orr of a fully vested right to receive distributions from the trust on at least an annual basis. These interests constitute "property" or "rights to property" under § 6321, even though the beneficiary does not possess total, exclusive, fee-simple ownership.

The broad scope of 26 U.S.C. § 6321, encompasses "property" in this sense, as befits that statute's purpose of tax collection, *see* ***United States v. National Bank of Commerce***, 472 U.S. 713, 719-20, 105 S. Ct. 2919, 2923-24 (1985). Courts have routinely concluded that § 6321 tax liens attach to other types of equitable interests. *See, e.g.*, ***Southern Bank v. IRS***, 770 F.2d 1001, 1003, 1009-10 (11th Cir. 1985) (equitable right of redemption); ***Runkel v. United States***, 527 F.2d 914, 916 (9th Cir. 1975) (equitable interest in real property); ***United States v. Johansson***, 447 F.2d 702, 705 (5th Cir. 1971) (equitable lien); ***United States v. Klimek***, 952 F. Supp. 1100, 1112 (E.D. Pa. 1997) (equitable ownership of real property); ***Bank of Lyons v. Cavanaugh (In re Cavanaugh)***, 153 B.R. 224, 228 (Bankr. N.D. Ill. 1993) (equitable interest in a land trust).*

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* ***Texas Commerce Bank Nat'l Ass'n v. United States***, 908 F. Supp. 453 (S.D. Tex. 1995), relied upon by Orr, is not to the contrary. ***Texas Commerce Bank*** involved an attempt by the IRS to levy upon the interest of Ellanor Ann Fondren in a trust in which payments to her were left to the sole discretion of the trustee until the year 2002. The court ruled that distributions made to Fondren in trustee's discretion did not violate the levy because Fondren had no interest to which the levy could attach. Unlike the spendthrift trust in this case, the discretionary nature of the trustee's power in ***Texas Commerce Bank*** meant that the beneficiary had no property or rights to property to which the levy could attach. And although the trust provided that Fondren would be entitled to future income distributions that right was "clearly a contingent, non-vested, and non-determinable right" at the time the IRS imposed its levy.

We also note that it is not clear from the ***Texas Commerce Bank*** opinion why the ***Glass City Bank*** and ***Dallas*** principles of

(Cont'd)

Moreover, the attachment of the lien in this case is not at odds with the Texas policy of respecting the wishes of the creator of a spendthrift trust by enforcing the trust's anti-alienation provisions. The wishes of the creator of the spendthrift trust are to ensure a stream of income for the beneficiary by preventing the beneficiary from leveraging present purchasing power out of future payments. The state may (and Texas does) think it advisable to respect the wishes of the creator of the trust by enforcing the spendthrift term. Creditors in Texas are on notice of the unenforceability of any loan agreement with a trust beneficiary that purports to grant an interest in future distributions from a spendthrift trust. The risk of default is thereby placed on the shoulders of creditors who rely on the spendthrift trustee's income stream.

The government does not stand in the shoes of an ordinary creditor seeking to attach distributions from a spendthrift trust. Consistent with the imperative nature of tax collection, § 6321 gives the government an advantage over ordinary creditors in collection matters. Moreover, the rationale for shifting the risk of default to creditors, who ought to examine the terms of a trust before agreeing to accept the right to future distributions as collateral, does not apply to the government, which imposes the income tax unilaterally

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(Cont'd)

tax liens' attachment to after-acquired property, including distributions from a spendthrift trust, would not have applied to the trustee's distributions to Fondren. In any case, ***Texas Commerce Bank*** does not support Orr's contention that a vested right to future payments from a spendthrift trust cannot be property or rights to property susceptible to attachment by a tax lien.

and without reference to spendthrift protections. The wishes of the creator of a spendthrift trust cannot overcome the government's need to collect tax and a spendthrift trust beneficiary's duty to pay tax. It does not make sense to permit the spendthrift trust to be a vehicle for tax immunity.

Though not dispositive of the meaning of "property and rights to property" under § 6321, we further note that Texas law supports the classification of Orr's interest in the Trust as "property." In determining the ordinary meaning of the term "property" for the purposes of statutory construction, the Supreme Court of Texas has characterized it as extending to "every species of valuable right and interest." ***State v. Public Util. Comm'n***, 883 S.W.2d 190, 200 (Tex. 1994) (citing ***Womack v. Womack***, 141 Tex. 299, 172 S.W.2d 307, 308 (1943)); *cf.* Tex. Prop. Code Ann. § 111.004(12) (Vernon 1995) (for purposes of the Trust Code: " 'Property' means any type of property, whether real, tangible or intangible, legal, or equitable. The term also includes choses in action, claims, and contract rights, including a contractual right to receive death benefits as designated beneficiary under a policy of insurance, contract, employees' trust, retirement account, or other arrangement.").

We are aware of authority suggesting that "[i]n enforcing § 6321, appellate courts have interpreted 'property' or 'rights to property' to mean state-law rights or interests that have pecuniary value and are transferable." ***Drye Family 1995 Trust v. United States***, 152 F.3d 892, 895 (8th Cir. 1998) (citing ***United States v. Stonehill***, 83 F.3d 1156, 1159-60 (9th Cir. 1996); ***In re Kimura***, 969 F.2d 806, 811 (9th Cir. 1992); ***In re Terwilliger's Catering Plus, Inc.***, 911 F.2d

1168, 1171-72 (6th Cir. 1990); ***21 West Lancaster Corp. v. Main Line Restaurant, Inc.***, 790 F.2d 354, 357-58 (3d Cir. 1986); ***Southern Bank v. IRS***, 770 F.2d 1001, 1005 (11th Cir. 1985)), *cert. granted on other grounds*, 119 S. Ct. 1453 (1999). We think this test takes an unnecessarily narrow view of the scope of § 6321. In particular, we know of no controlling authority which compels the conclusion that transferability is a necessary incident of "property and rights to property" under the statute. Indeed, a persuasive scholarly treatment of the question comes to the opposite conclusion. *See* Note, *Property Subject to the Federal Tax Lien*, 77 *Harv. L. Rev.* 1485, 1485-87 (1964).

The terms "property and rights to property" have no statutory definition. This Court has noted in the past that in crafting the tax lien statute, "Congress did not attempt to define the commercial cosmos. Rather, it was perfectly willing to let contemporary transactions be analyzed to determine whether or nor the delinquent taxpayer had any part of a bundle of rights of commercial value, to which the tax lien would then attach." ***Randall v. H. Nakashima & Co., Ltd.***, 542 F.2d 270, 278 (5th Cir. 1976). And it bears repeating that the Supreme Court has held that "Congress meant to reach every interest in property that a taxpayer might have." ***National Bank of Commerce***, 472 U.S. at 719, 105 S. Ct. at 2924. Each case requires individual consideration, and we conclude that despite the nontransferability of a spendthrift trust beneficiary's interest in the trust, Orr's interest still possesses sufficient characteristics of "property" or "rights to property" to fall within the scope of § 6321.

With reference to Texas law, we conclude that at the time the liens were filed, Orr possessed equitable and legal rights to future income distributions from the Trust. With reference to federal law, we conclude that those rights constituted "property" or "rights to property" subject to attachment pursuant to § 6321. Because the federal tax lien attached to Orr's rights to future payments at the time of the filing of the lien, Orr's subsequent bankruptcy does not affect the validity of the lien against Orr's equitable ownership of the Trust and legal right to receive income distributions from the Trust. The tax lien is therefore valid against future income distributions.

## IV.

In sum, we conclude that we may exercise appellate jurisdiction in this case. The subject matter of the appeal is a discrete issue within a larger bankruptcy case, which was presented in the context of an adversary action between the parties. The order of the district court settled the sole issue in contention. Jurisdiction is proper under 28 U.S.C. § 158(d).

Furthermore, the IRS has a valid lien against future income distributions to Orr from the Trust. Under state law, Orr possesses an equitable interest in the trust corpus and legal entitlement to future income distributions from that trust. These interests constitute "property" or "rights to property" to which a 26 U.S.C. § 6321 tax lien may attach.

**AFFIRMED.**

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION, ON APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT AND DELIMITING THE ATTACHMENT OF APPELLANT'S LIEN TO APPELLEE'S SPENDTHRIFT TRUST DATED JANUARY 14, 1998**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. No. C-97-357

INTERNAL REVENUE SERVICE,

Appellant,

v.

JOHN DAVIS ORR,

Appellee.

**ORDER ON APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT AND DELIMITING THE ATTACHMENT OF APPELLANT'S LIEN TO APPELLEE'S SPENDTHRIFT TRUST**

On this date came on to be considered Appellant Internal Revenue Service's ("IRS") Appeal from the Order Granting Summary Judgment issued by the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division. That Order granted Appellee John Davis Orr's

("Orr") motion for summary judgment, finding that the IRS's federal income tax liens attach only to the distributions which Orr received from his spendthrift trust prior to April 30, 1996. In effect, the Bankruptcy Court found that Orr's prepetition equitable interest in his future spendthrift trust income did not constitute "property" within the meaning of 26 U.S.C. § 6321. This Court reverses.

## *I. JURISDICTION*

The Court has jurisdiction pursuant to 28 U.S.C. § 158(a).

## *II. PROCEDURAL & FACTUAL HISTORY*

In 1965, Orr's grandmother created a spendthrift trust which yields the income that is at issue in the present dispute. This trust provides that "all net income of the trust shall be distributed" to Orr, provided only that Orr is competent and over the age of thirty. (Trust para. 5.) In accordance with the trust, Orr has regularly received payments of the annual income and has also been made a co-trustee. The trust income is granted to Orr unconditionally and permanently, and the trust requires the trustee to disburse all of the income to Orr at least annually.[1]

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1. The settlor originally created two trusts for Orr. Trust "A" distributed the principal to Orr in three separate payments when he reached the ages of 30, 35 and 40. Trust "B" is the trust at issue and automatically pays its full net income to Orr from the time he turned 30 years old. Trust "B" includes a spendthrift clause. Thus, in creating Trust B, the settlor explicitly created the exclusive power in Orr to collect the trust's income during his lifetime.

*Appendix B*

Between 1984 and 1991, Orr failed to file his federal income tax returns, incurring over $630,000 in tax liabilities. Consequently, in 1993, the IRS properly filed Notices of Federal Tax Liens pursuant to 26 U.S.C. § 6671, thereby securing payment of these tax liabilities. On November 1, 1995, Orr petitioned for bankruptcy relief under Chapter 7, and he received a discharge of personal liability on May 21, 1996. Of course, in accordance with 11 U.S.C. § 524(a)(1), this discharge did not remove the federal tax liens from Orr's prepetition property.

Months prior to receiving his discharge, in February 1996, Orr filed an adversary requesting the Bankruptcy Court to determine precisely to what property interests the federal tax liens had attached. In particular, with respect to the spendthrift trust, Orr wanted to know whether the liens attached only to prepetition income payments, or if the liens attached to his interest in the trust income such that the IRS could also collect its debt from the post-petition disbursements. That is, Orr asked the court to choose between two plausible construals of what constituted Orr's property upon filing for relief: (1) Orr owned only the income already disbursed to him from the spendthrift trust, or (2) Orr owned an interest in the spendthrift trust which was in itself an attachable property interest. Orr preferred the former construal since it would mean that the IRS' liens are dischargeable as to his trust income which is disbursed post-petition. In contrast, the IRS maintained that the federal tax liens had attached to Orr's prepetition interest in the spendthrift trust itself, and therefore the IRS could collect its debts from all of Orr's trust income — whether disbursed prepetition or post-petition.

*Appendix B*

On April 7, 1997, the Bankruptcy Court ruled in favor of Orr — i.e., that the IRS could satisfy its tax liability only out of trust income distributions made prior to Orr's petition (i.e., through April 30, 1996).[2] In effect, the Bankruptcy Court held that, in these circumstances, Orr's interest in his spendthrift trust income was not attachable property until Orr had the right to alienate the disbursed income, even if he did have exclusive rights to all future income accrued during his life. In making this decision, that court relied on a case from 1945, *United States v. Dallas Nat'l Bank*, 152 F.2d 582 (5th Cir. 1945), *modified*, 164 F.2d 489 (1947), *modified*, 167 F.2d 468 (1948), which was subsequently modified twice by the Fifth Circuit and, regardless, does not address the issue before this Court.

## *III. STANDARD OF REVIEW*

This Court has capacity to hear appeals from decisions of a bankruptcy court, *See* 28 U.S.C. § 158, and it reviews findings of fact by the bankruptcy court under the clearly erroneously standard and decides issues of law de novo.

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2. While Orr petitioned for relief on November 1, 1995, Section 541(a)(5)(A) of the Bankruptcy Code creates a 180-day window during which petitioner's new income will be included in the estate subjected to prepetition liabilities. Therefore, Orr's "prepetition" estate effectively included, at the least, all disbursements made through April 30, 1996, rather than through his actual petition date of November 1, 1995. *See* 11 U.S.C. 524(a)(5)(A). The Bankruptcy Court properly identified this cut-off date (of course, the identification of this date could be made independently of how the court construed the extent of Orr's property upon filing for bankruptcy).

*Matter of Haber Oil Co., Inc.*, 12 F.3d 426, 434 (5th Cir. 1994); *Matter of Killebrew*, 888 F.2d 1516, 1519 (5th Cir. 1989).

## *IV. DISCUSSION*

### a. The Nature of Federal Tax Liens Issued Pursuant to 26 U.S.C. § 6321

When a person fails to pay federal taxes, all property rights that the person has or acquires thereafter are subject to a federal tax lien immediately and automatically. *See* 26 U.S.C. § 6321. Such a lien will attach to all property acquired during the life of the lien, including property acquired after its assessment. *Glass City Bank of Jeanette, Pa. v. United States*, 326 U.S. 265, 66 S.Ct. 108 (1945). While the reach of a § 6321 lien is very broad, it does not apply to property acquired after bankruptcy. *In re Conner*, 27 F.3d 365, 366 (9th Cir. 1994); *see e.g.*, *In re Braund*, 289 F. Supp. 604 (C.D.Cal.1968), *aff'd sub nom*, *United States v. McGugin*, 423 F.2d 718 (9th Cir.), *cert. denied*, 400 U.S. 823, 91 S.Ct. 44 (1970).

A § 6321 lien is not easily limited. First, such federal tax liens are not subject to any state laws that govern ordinary liens or to any state perfection requirements. *See United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 51, 71 S.Ct. 111, 113-14 (1950); *Legget v. United States*, 120 F.3d 592, 594 (5th Cir. 1997). With respect to the operation of such liens, "there is no doubt that the paramount right to collect taxes of the federal government overrides a state statute providing for exemptions." *Lueschner v. First*

*Western Bank and Trust Company*, 261 F.2d 705, 708 (9 Cir. 1958). This means, for example, that barriers against creditors — which are the hallmark of a spendthrift trusts created under state law — cannot prevent a federal tax lien from attaching to the beneficiary's interests in that trust. *United States v. Rodgers*, 461 U.S. 677, 683, 103 S.Ct. 2132, 2137 (1985); *United States v. Bess*, 357 51, 56-57, 78 S.Ct. 1054, 1057-58 (1958) (once it has been determined that state law has created property interests sufficient for federal tax lien to attach, state law "is inoperative to prevent the attachment" of such liens); *see also*, *Dallas 1*, 152 F.2d at 585 ("If [IRS statutes] are in conflict with State law, constitutional or statutory, the latter must yield"). Second, a § 6321 lien is not limited by a discharge in bankruptcy: such a discharge only extinguishes the debtor's personal liability, 11 U.S.C. § 524(a)(1), and does not prevent the enforcement of valid tax liens against the debtor's bankruptcy estate. 11 U.S.C. § 522(c)(2)(B).

Further, § 6321 is intended to be broad in scope and to apply to every interest the taxpayer has in property. *See United States v. National Bank of Commerce*, 472 U.S. 713, 719-20, 105 S.Ct. 2919, 2923-24 (1985); *Legget*, 120 F.3d at 594. The statutory language used in § 6321 "reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. . . . 'Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes' " *National Bank of Commerce*, 105 S.Ct. at 2924, *citing*, *Glass City Bank*, 326 U.S. at 267, 66 S.Ct. at 110.

In sum, when a federal tax lien is created pursuant to § 6321, it attaches (and remains attached) to all of the debtor's prepetition property interests, notwithstanding state law spendthrift trust restrictions on alienation. Three questions remain for this Court. First, what kind of prepetition property interest did Orr have? Second, does a § 6321 lien attach to such property interests? And, third, what effect, if any, did Orr's filing for bankruptcy have on the lien's prepetition attachment?

**b. The Nature of Orr's Property Interest**

Property is generally characterized as an aggregate of rights; "the right to dispose of a thing in every legal way, to possesses it, to use it, and to exclude everyone else from interfering with it." *Black's Law Dictionary* 1095 (5th ed. 1979). This so-called "bundle of rights and powers" can be divided among a number of persons, each of whom then possesses an interest that is less than absolute ownership. *In re Terwiliger's Catering Plus, Inc.*, 911 F.2d 1168, 1178 (6th Cir. 1990), *cert denied*, 111 S.Ct. 2815 (1991); *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992). Thus, there are various types of property interests.

While the Supreme Court mandates a broad scope of attachment to property under § 6321, the section does not define what kind of property interests constitutes an attachable property interest for § 6321 purposes. Instead, in this context, it is left to state law to determine whether a taxpayer has a property interest to which a federal lien may attach. *See National Bank of Commerce*, 105 S.Ct. at 2925-26; *Bess*, 357 U.S. at 55, 78 S.Ct. at 1057; *Legget*, 120

F.3d at 594. Therefore, the Court must look to Texas law for a characterization of Orr's property interest in the spendthrift trust.

Texas courts have long upheld and enforced spendthrift trust provisions. *Burns v. Miller, Hiersche, Martens*, 948 S.W.2d 317, 320 (Tex.App. — Dallas 1997 writ denied); *Dierschke v. Central Nat'l Branch of First Nat'l Bank at Lubbock*, 876 S.W.2d 377, 380 (Tex.App. — Austin 1994, no writ). Under Texas law, a spendthrift provision generally prohibits a beneficiary from anticipating or assigning his interests in the trust. *Id.* Spendthrift trusts protect the beneficiary's interest in the trust corpus and income from claims of a beneficiary's creditors simply while the corpus and income remain in the trust and are held by the trustee. *Id.* The trust code essentially codified Texas common law. TEX.TRUST CODE ANN. § 112.035 (Vernon 1995); *see Burns*, 948 S.W.2d at 321-2.[3]

While Texas law prohibits creditors from reaching the beneficiary's income from a spendthrift trust, it does not deny that the beneficiary holds an "ownership interest" in the trust. *Burns*, 948 S.W.2d at 322. In *Burns*, the Court reasoned that, unless trust beneficiaries had an ownership interest in trust assets, spendthrift provisions preventing the alienation of such assets would be superfluous. *Burns*, 948 S.W.2d at 322. Thus, while the trustee holds bare legal title and the right to possession of spendthrift trust assets, it is "the beneficiary [who] is considered the real owner of the property, holding

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3. Of course, as explained above, such state law barriers to creditors do not apply to the IRS.

equitable or beneficial title." *Id.*; *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 589 (Tex.App. — Corpus Christi 1995, no writ); *Dierschke*, 876 S.W.2d at 381.

In the present case, it is undisputed that paragraphs 5 and 26 of the trust in question create a spendthrift trust and that Orr is the sole beneficiary. Consequently, under Texas law, Orr had a vested equitable interest in the trust income when the lien attached and when he filed for bankruptcy.

**c. Federal Tax Liens Regularly Attach to Equitable Interests**

The Court must now determine precisely in what manner a federal tax lien attaches to a beneficiary's equitable interest in a spendthrift trust. As noted above, Congress intended for liens to attach broadly under § 6321, *see United States v. National Bank of Commerce*, 472 U.S. 713, 719-20, 105 S.Ct. 2919, 2923-24 (1985); *Legget*, 120 F.3d at 594, and, accordingly, courts have regularly held that such liens attach to imperfect property interests in general and to equitable property interests in particular. For example, federal tax liens attach to rights under a contract which are dependant upon future performances. *Seaboard Surety Co. v. United States*, 306 F.2d 855 (9th Cir. 1962), to royalties which are contingent on a third party's performance, *United States v. Phillips*, 715 F.Supp. 81 (S.D.N.Y. 1989), to equitable interests in the form of realty contracts, *Runkel v. United States*, 527 F.2d 914 (9th Cir. 1975), and to a beneficiary's equitable interest in a land trust. *In re Cavanaugh*, 153 B.R. 224, 228 (Bankr.N.D.Ill. 1993). As the *Cavanaugh* court explained: ". . . the beneficial interest in a land trust is clearly

property of the beneficiary of the land trust, not the property of the land trustee. Thus, a federal tax lien against a beneficiary of a land trust does not attach to the underlying res in the land trust. However, a federal tax lien can attach to the beneficiary's beneficial interest in the land trust" (citations omitted). *Id.* at 228.

In the case relied on by the bankruptcy court (*Dallas 1*, *supra*), the Fifth Circuit addressed the issue of how a federal tax lien attaches to an equitable interest in a spendthrift trust, but that case is not determinative of the instant issue because this case involves a debtor/beneficiary who has filed for bankruptcy whereas *Dallas 1* merely involved a debtor/beneficiary who continued to receive spendthrift trust payments after the lien had attached. *Id.* In *Dallas National Bank*, the debtor owed federal taxes and so a lien was declared on her property, including her interest in the income from a spendthrift trust. *Dallas 1*, at 584. Her interest gave her the right to receive non-discretionary payments of the income generated by real property, and the government wanted to satisfy its debt from those payments as they were disbursed. *Id.* The Fifth Circuit held that, in accordance with 26 U.S.C. §§ 3670 and 3671, federal liens attach to property acquired after creation of the lien. *Id.* at 585. Accordingly, *Dallas 1* stands for the limited and well-established proposition that, when a federal tax lien attaches to a spendthrift trust, the IRS may collect its debt from all future disbursements of the trust income. *Id.* at 585.

Orr cites a phrase from *Dallas 1* which, when taken out of context, appears to support his position that the lien cannot attach to post-petition disbursements until the moment they

are paid. The passage gives this impression because, for its immediate purposes, the Fifth Circuit could treat the question of property rights as a simple "either/or" proposition — either the debtor has full property interests or no property interests at all:

> [the debtor] has no title to the corpus of any property other than the profits after they have accrued and have been passed to her account and made available to her by the Trustee. In other words, after the "net revenues" . . . accrue, or are set apart and become payable to her, such net revenues then belong to her and are then subject to the lien . . . and are available as an appropriate res in a proceeding in rem by the Government to have a lien for delinquent taxes declared and enforced against such revenues. *Id.* at 585.

Although the Fifth Circuit did not need to decide the issue, this passage appears to say that federal tax liens attach to a beneficiary's interest in spendthrift trust income only as those income payments are made — in other words, these liens could only attach on a payment-by-payment basis, as if the beneficiary had no property interest in the income until the moment in which she exercised full proprietary powers over the income.

However, such an interpretation of *Dallas I* conflicts with fundamental principles of property law which allow for a "bundle of rights" in any particular piece of property, *Terwiliger's*, 911 F.2d at 1178, and, further, the Fifth Circuit's subsequent rehearings of this case indicate that

*Dallas 1* must be read in accordance with these fundamental principles. In *Dallas 2* and *Dallas 3*, the court confirms its holding which is now an established tenet of tax law: that future disbursements from a spendthrift trust are subject to federal tax liens. *Dallas 2*, at 489; *Dallas 3* at 469. In *Dallas 2*, the debtor asserted that *Dallas 1* gave the government only the right to a single income disbursement, and not all subsequent ones. *Dallas 2* at 489. In explaining the nature of the government's right of recovery, the Court stated it previously had held that:

> the [debtor] *had an interest* in the trust property, but not an interest that could be sold; but that her share in the income after it accrued and was ready to be paid over to her was fully her property and could be subjected to the tax lien of the United States, and that the lien could be fastened on the future monthly income as it became payable to the taxpayer. *Id.* (emphasis added).

Thus, the phrasing of the modified opinion clarifies that the debtor had a property interest prior to the disbursements. Similarly, in *Dallas 3*, Judge Holmes states in his concurrence that the debtor "is the equitable owner for life of an undivided interest in Texas realty." *Dallas 3*, at 469.

The rehearings confirm that the beneficiary of a spendthrift trust has an equitable interest, and therefore it is inaccurate to read *Dallas 1* as saying that such a beneficiary has no interest until paid trust income. Also, these cases confirm that the government can collect from all future payments. What the *Dallas* cases are really discussing in

the phrase cited by Orr is the ability of a lien to extend to future payments and the mechanics of collection of those payments, instead of discussing the way a lien attaches to that equitable interest prior to bankruptcy proceedings. Indeed, Judge Holmes states that *Dallas 2* holds that the debtor "had an interest in the trust property but not an interest that could be sold." *Id.* (concurring, Holmes, J.), and that the previous decision thereby was limiting the manner in which the government could collect its debt: it could collect the payments as they were made, but could not sell the debtor's equitable interest or the corpus itself.[4] Meanwhile, the case does not reach the question of the effect of bankruptcy proceedings on the government's right to collect those payments.

In sum, what can be gleaned from case law is that (1) underlying policy considerations call for broad attachment of federal tax liens to all sorts of property interests, including equitable interests, (2) that federal tax liens attach to an equitable interest in a spendthrift trust, and (3) that such attachment presumes that IRS will be able to collect all future disbursements. What cannot be answered from reading *Dallas* and the forgoing cases is whether, when a debtor files bankruptcy, the rule that liens attach only to

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4. Indeed, the quoted passage from *Dallas 2* could be read as holding that the debtor had an interest prior to disbursement and that the lien could not attach to such an interest. However, it is unreasonable to read the case in that way because the court simply was not deciding that issue: rather, it was deciding at what moment the IRS could collect the money from her — i.e., at what moment her property was "subjected" to the lien, and not at what moment the lien attached to her property interest.

prepetition property will somehow restrict the lien's attachment to only those disbursements made prepetition.

**d. The Effect of Filing Bankruptcy on Federal Tax Liens**

To determine whether Orr's filing for bankruptcy limits the attachment of the liens to only prepetition payments from the spendthrift trust, the Court must look to analogous situations since there is not a case directly on point. In Orr's case, he had an equitable interest and the federal liens attached to that interest. The question remains as to what (if anything) happened to that lien's attachment when Orr filed bankruptcy. As explained below, the effect of filing bankruptcy in such circumstances depends primarily on the nature of the beneficiary's prepetition property interest: was the right to post-petition payments contingent, or was the right unconditional?

In *In re Conner*, 27 F.3d 365 (9th Cir. 1994), the IRS noticed a federal lien on the property of a retired supreme court justice of the Alaska Supreme Court ("Conner") pursuant to § 6321. *Id.* at 365. Two years later, Conner filed for bankruptcy and was discharged of personal liability for the tax debt. *Id.* at 366. The question in *Conner* was whether the lien attached to his prepetition beneficial interest in his retirement benefits such that the IRS could satisfy its debt from his post-petition disbursements.

Like Orr, Conner sought a determination that his future payments were "after-acquired property" and thus clear of the lien. *Id.* The Ninth Circuit noted that this question "turns

upon the nature of the rights created by Alaska's judicial retirement system." *Id.* Finding that the right was not contingent on any future occurrence or service, the Court found that "this unqualified right to receive future payments constituted "property" within the meaning of § 6321." *Id.* The Court noted that it did not make any difference that Conner himself had not made any contributions to the benefits program. *Id.*. That is, the court recognized that the relevant issue was simply that Conner's right to the payments was unqualified.

Several bankruptcy courts have also found this inquiry to be the relevant one when determining precisely how federal tax liens attach to prepetition property interests which guarantee the beneficiary post-petition disbursements. For example, in *In re Wesche*, 193 B.R. 76 (Bankr.M.D.Fla. 1996), the court was faced with the issue of whether federal tax liens attach to the debtor's post-petition civil service retirement payments. That court found it "firmly established in case law that a federal tax lien attaches to a then existing right to receive property in the future." *See also*, *Tillery v. United States*, 204 B.R. 575 (Bankr.E.D.Okla. 1996); *Wessel v. United States*, 161 B.R. 155 (Bankr.D.S.C.1993).

As with the retirement and civil service payments, Orr's right to the future payments was unqualified and guaranteed at the time the lien was created. Further, as in *Conner*, it does not matter that Orr made no contribution to the spendthrift trust to earn these future disbursements. Nor does it matter that Orr, like Conner, could not alienate his beneficial interest. What matters here is that Orr had an

unconditional right to the income payments for the rest of his life.[5]

In sum, both the applicable statutes and the relevant case law indicate that the § 6321 lien must enable the IRS to collect the tax debt from all of Orr's trust income which is disbursed after April 30, 1996. First, under Texas law, the present right to future spendthrift trust income constitutes an equitable property interest. Second, in accordance with Congress' intent, § 6321 liens normally attach to a broad scope of property interests, including equitable interests. Third, when § 6321 liens attach to equitable property interests which unconditionally guarantee future income, they remain attached to that interest (and thus subject the future income to collection), even when the owner of the interest receives a personal discharge through bankruptcy proceedings. These three principles necessarily support the conclusion that the § 6321 lien attached to Orr's prepetition equitable interest in Trust B and remained attached to the interest after he received his personal discharge.

Finally, there are no extrinsic policy interests which could make the Court deviate from the logical conclusion of these principles. Orr suggests that policies implicit in both state law and the IRS code should temper the lien's attachment to his property. First, with respect to his state law arguments, since § 6321 liens are never subject to state law barriers to collection, there is no reason to expect that the state's purposes in allowing for spendthrift trusts should

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5. Notably, Orr also has testamentary power over the trust corpus.

somehow alter the way a § 6321 lien attaches to an equitable interest. That is, it is irrelevant that state law aims to afford settlors control over the corpus or to ensure the that a beneficiary will not lose the guaranteed income.

Second, Orr's contentions based on the Bankruptcy code are equally unpersuasive. He essentially asserts that, since the Bankruptcy code creates the 180-day window following a debtor's filing of bankruptcy during which new income is included in the bankruptcy estate, the code intends to guarantee that all of debtor's income disbursed after that 180 days must be free of attachment — i.e., all subsequent income must be part of the debtor's "fresh start." Yet it is a matter of settled precedent that, pursuant to § 6321 liens, the IRS collects debts from income disbursed after that 180-day window. *Conner*, 27 F.3d 365; *Wesche*, 193 B.R. 76; *Tillery*, 204 B.R. 575; *Wessel*, 161 B.R. 155. Orr's contentions are simply attempts to circumvent the critical issues which must decided by looking to federal law on the nature of federal tax liens and to state law on the nature of Orr's property interest.

## *V. CONCLUSION*

For the forgoing reasons, the Court ORDERS that IRS' lien shall attach to all income distributions made to Orr from the spendthrift trust at issue (Trust B of the Unis Chapman Eichelberger Chapman Ranch Trust I), including those distributions made after April 30, 1996. Accordingly, the Court hereby ORDERS that the bankruptcy court's Order Granting Summary Judgment to Orr is OVERRULED.

*Appendix B*

SIGNED and ENTERED on this the 14 day of January 1998.

s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT
JUDGE

## APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION, GRANTING SUMMARY JUDGMENT DATED APRIL 4, 1997 AND ENTERED APRIL 7, 1997

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**CORPUS CHRISTI DIVISION**

**Case No. 95-22895-C-7**

**IN RE:**

**JOHN DAVIS ORR**

**DEBTOR**

---

**Adversary No. 96-2021-C**

**JOHN DAVIS ORR**

**PLAINTIFF**

**V.**

**INTERNAL REVENUE SERVICE**

**DEFENDANT**

**ORDER GRANTING SUMMARY JUDGMENT**

On this day came on for consideration the Motion for Summary Judgment and Incorporated Brief in support

*Appendix C*

Thereof filed by John Davis Orr ("Orr"), and the response thereto, and Cross Motion for Summary Judgment of the Internal Revenue Service. The Court, after reviewing the pleadings and hearing the arguments of counsel, finds that the facts were stipulated and Orr's Motion is well taken and should be granted. The case of *United States v. Dallas Nat'l Bank*, 152 F.2d 582 (5th Cir. 1985), applies here and supports the contentions made by Orr.

It is therefore ORDERED that the Motion for Summary Judgment of John Davis Orr be and it hereby is GRANTED.

It is further ORDERED that the liens of the Internal Revenue Service shall attach to distributions made to Mr. Orr from the Unis Chapman Eichelberger Chapman Ranch Trust I during the period from November 1, 1995 to April 30, 1996, but that any and all subsequent distributions shall not be subject to these liens.

It is further ORDERED that the Cross Motion of the Internal Revenue Service is hereby DENIED.

Dated this 4 day of Apr., 1997.

s/ Richard S. Schmidt
RICHARD S. SCHMIDT
United States Bankruptcy Judge

**APPENDIX D — JOINT STIPULATION OF ISSUES AND FACT DATED AND FILED DECEMBER 2, 1996**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CASE NO. 95-22895-C-7
(CHAPTER 7)

IN RE:

JOHN DAVIS ORR,

DEBTOR

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ADV. NO. 96-2021-C

JOHN DAVIS ORR

VS.

INTERNAL REVENUE SERVICE

**JOINT STIPULATION OF ISSUES AND FACT**

The parties present the following stipulations to the Court to resolve this case:

**STIPULATION OF ISSUES**

1. Whether the Internal Revenue Service's Notices of Federal Tax Lien attached to any interest of Debtor in the Unis Chapman Eichelberger Chapman Ranch Trust I

to secure the payment of Debtor's federal income tax liabilities for 1984 through 1992?

## STIPULATIONS OF FACT

1. John Orr filed for relief under Chapter 7 on November 1, 1995, and received his discharge on May 21, 1996.

2. Mr. Orr failed to file his federal income tax returns for 1984 through 1991. After examination, the IRS and Mr. Orr agreed to the amount of tax and signed a Form 4549-CG, Income Tax Examination Changes, consenting to assessment and collection on October 1, 1992. On October 26, 1992, the Internal Revenue Service assessed the taxes, penalties and interest reflecting the consent.

3. Despite notice and demand, Debtor's federal income tax liabilities for the taxes assessed on October 26, 1992 (to the date of the petition) are as follows:

| Year | Amount |
|---|---|
| 1984 | $160,062.08 |
| 1985 | 63,126.91 |
| 1986 | 88,018.08 |
| 1987 | 79,723.98 |
| 1988 | 141,729.83 |
| 1989 | 29,435.00 |
| 1990 | 45,436.27 |
| 1991 | 23,842.35 |

4. Notices of Federal Tax Liens were filed in the personal and real property records of Nueces County, Texas for the 1984 through 1991 income tax liabilities on January 11, 1993.

5. Mr. Orr also owed, federal income taxes on the date of petition for 1992 in the amount of $2.69. Notices of Federal Tax Liens were filed in the personal and real property records of Nueces County, Texas for the 1992 income tax liability on December 28, 1993.

6. At the time the Notices of Federal Tax Liens were filed, Mr. Orr was a resident of Nueces County, Texas.

7. Mr. Orr was born on May 20, 1951. At the time of the filing of the petition on November 1, 1995, he was 44 years old.

8. On April 24, 1965, Unis Chapman Eichelberger, Debtor's grandmother, executed a document entitled "Unis Chapman Eichelberger Chapman Ranch Trusts". The documents will also be referred to as the "Trust Document". A true and correct copy of the Trust Document is attached.

9. Debtor, John Davis Orr, is the named principal beneficiary of the Unis Chapman Eichelberger Chapman Ranch Trust I described in the Trust Document. Unis Chapman Eichelberger Chapman Ranch Trust I will hereinafter be referred to as the "Trust", unless otherwise indicated.

*Appendix D*

10. The terms of the Trust Document have not been changed since inception.

11. All property used to establish the Trust or donated to the Trust was conveyed before 1980.

12. Both Unis Chapman Eichelberger and H. L. Eichelberger are deceased.

13. Mercantile Bank, N.A. and John Davis Orr are co-trustees of the Chapman Ranch Trust I.

14. The following recitations of provisions of the Trust document is for the convenience of the Court. The parties believe that the following paragraphs will assist the Court but do no intend to bind either party to only referring to the paragraphs reprinted below in either parties argument.

15. Paragraph 1 reads in part:

> I hereby establish three separate trusts, referred to here as the Unis Eichelberger Chapman Ranch Trusts Numbers I, II and III, respectively. For convenience, John Davis Orr is referred to here as the principle beneficiary of Trust I . . . even though at times and under certain conditions, such persons are not entitled to the principal benefits from such trusts . . . An undivided one-third (1/3) interest in the property conveyed and assigned by me to my trustee is conveyed to him in his capacity as trustee of each of such trusts, respectively.

*Appendix D*

16. Paragraph 2 reads in part:

> Upon additional property hereafter being acquired by any of the trusts created in paragraph one, each trust shall be divided into two shares, referred to here as Share A and Share B. The division shall be made in the following manner:
>
> (a) Such property shall be allocated to Share A and Share B as the will, deed or gift or other instruments making the transfer shall provide. If the instrument making such transfer does not provide for the allocation of such property between Share A and Share B, such property shall be added to the principle of Share A and Share B on the following basis.
>
> (1) If any of the trusts hereafter acquired any land out of the Chapman Ranch, Nueces County, Texas, such property shall be a portion of Share A . . .
>
> (2) If any of the trusts hereafter acquire any additional property other than that defined as a portion of Share A above, such property shall be a portion of Share B.
>
> (b) All of the net income of each trust shall, except to the extent it is distributed in accordance with the further provisions hereof, be considered a portion of Share B. The net

income of Share A, shall to the extent not distributed as hereafter provided, be added to and considered a portion of Share B.

17. Paragraph 5 reads in part:

> Beginning one year after the deaths of Unis Chapman Eichelberger and H. L. Eichelberger have occurred, the following distributions shall be made:
>
> (c) When a principal beneficiary of a trust reaches the age of forty (40) years, the trustee shall distribute to him all then remaining assets of Share B of the trust of which he is the principal beneficiary, free of trust.

18. Paragraph 5(e) reads in part:

> (e) At all times when the principal beneficiary of a trust is living, over the age of thirty (30) years and competent, all of the net income of the trust shall be distributed to the principal beneficiary annually or at more frequent intervals.

19. Paragraph 6 reads in part:

> The Term of each of the trusts established herein shall last until . . . for the life of the principal beneficiary of the trust . . . At the termination of each trust, all of the then remaining assets of such

trust shall be distributed as the . . . principal beneficiary shall have appointed . . . Such power of appointment may in no event be exercised directly or indirectly in favor of the person having such power hereunder, nor directly or indirectly in favor of the estate of any such person, any creditor of any such person or any creditor of his estate, or for the purpose of meeting any legal obligation of any such person.

20. Paragraph 7 reads in part:

> If the person having a power of appointment under the preceding paragraph should fail to fully exercise it, or should release or relinquish such power of appointment without having fully exercised it, then such property with respect to which the power of appointment has been exercised shall be distributed to the then living decedents of the principal beneficiary . . . If no such persons are then living I direct my trustee to distribute such property among such corporations . . . organized and operated for the purpose of furthering education . . . of needy children.

21. Paragraph 11 reads:

> Notwithstanding any other provision of this instrument, no trustee shall have the power to appoint or apply trust funds in favor of himself individually; nor to appoint or apply funds in favor of his estate, his creditors, or the creditors of his

estate; nor to pay, satisfy, or discharge any legal obligation of the Grantor or of a trustee individually, nor for the pecuniary benefit of any such person. If a beneficiary should hereafter serve as trustee or as a co-trustee, the foregoing provisions of this paragraph shall not effect his rights as a beneficiary; however, nor shall they limit his duties as a trustee to make the distributions provided for herein.

22. Paragraph 21 reads in part:

> The trustee shall distinguish between income and principal of each trust . . . in accordance with reasonable trust administration.

23. Paragraph 26 reads:

> No trust assets or income shall be liable for the debts of any beneficiary, not subject to seizure under any judicial writ of proceeding. No beneficiary shall have the power to give, grant, sell, assign, transfer, mortgage, pledge, encumber, or in any manner to anticipate or dispose of the interest in the trust estate or its income or to dispose of any trust property until it has been actually delivered to him in accordance with the terms hereof, except that the foregoing shall in no manner restrict the authority otherwise granted to any trustee who is a beneficiary to distribute the trust property as provided herein.

24. The parties agree that Mr. Orr can be granted a personal discharge from his federal tax liability for 1984 through 1991 pursuant to 11 U.S.C. § 727. The parties agree that Mr. Orr cannot be granted a personal discharge of his federal income tax liability for 1992.

25. The parties agree that the Federal Tax Liens attached to the property or interest in property of Mr. Orr in existence at the time of the filing of this bankruptcy and the Federal Tax Liens are not dischargeable as to the property to which they attached. This agreement acknowledges that Mr. Orr has assets totalling $3,797.00 listed on his bankruptcy schedules to which the Federal Tax Liens attached. This agreement does not include the stipulation of whether or not the Federal Tax Lines attached or attaches to any interest of Mr. Orr in the Unis Chapman Eichelberger Chapman Ranch Trust I or its assets. Nor does this agreement include any stipulation that Mr. Orr has or had an interest in the Unis Chapman Eichelberger Chapman Ranch Trust I or its assets.

26. Mr. Orr has received no distributions from the Trust since November 1, 1995.

27. When the Debtor filed bankruptcy, he owned the following property:

    2.22 acres of land, more or less, out of and a part of Section D, Laureles Farm Tracts
    1983 Chevrolet Blazer
    Clothes

*Appendix D*

TV
VCR
Radio
Bedroom Set
Dressers (3)
Desks (2)
Couches (2)
Typewriter
Dining Room Table & Chairs
Bunk Beds
Nightstands
Computer Table
Book Shelf
Chair & Ottoman
Breakfast Table
Chairs (2) & Table
End Tables (2)
Lamps
Cordless Phone System
Caller ID Phone
Answering Machine
Jewelry – Watch

*Appendix D*

AGREED AS TO FORM AND CONTENT:

PIPITONE, SCHAUER, SIMANK &
LEDBETTER, P.C.
MT 159
615 N. Upper Broadway, Suite 2000
Corpus Christi, Texas 78477
(512) 884-4200
(512) 884-7444 (FAX)

By: s/ Ronald A. Simank
Ronald A. Simank
State Bar No. 18359400
Federal Admissions No. 0359

ATTORNEYS FOR DEBTOR,
JOHN DAVIS ORR

s/ Joseph A. Pitzinger, III
JOSEPH A. PITZINGER, III
Attorney, Tax Division
State Bar No. 16055800
Department of Justice
Maxus Energy Tower
717 N. Harwood, Suite 400
Dallas, Texas 75201
(214) 880-9728
(214) 880-9741 (FAX)

ATTORNEYS FOR INTERNAL REVENUE SERVICE

## APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 10, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40170

In The Matter Of: JOHN DAVIS ORR

Debtor

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INTERNAL REVENUE SERVICE

Appellee

v.

JOHN DAVIS ORR

Appellant

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

ON PETITION FOR REHEARING EN BANC
(Opinion 07/12/99, 5 Cir. __, __ 11 F.3d __)

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

*Appendix E*

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ Harold R. DeMoss, Jr.
United States Circuit Judge